In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1942

No. 759

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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No.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner, Bank of America National Trust and Savings Association, a national banking association, respectfully prays that a writ of certiorari issue to review the decision and decree of the Circuit Court of Appeals for the Ninth Circuit entered in the above

cause, No. 9785 on the docket of said Court, on September 14, 1942, on petition of the National Labor Relations Board, hereinafter referred to as the Board, for an order of enforcement of its decision and order made and entered on August 4, 1939. A petition to the Court below for rehearing was denied on December 17, 1942 (2087).[1]

OPINIONS BELOW.

The order and decision of the Board is reported in 26 N. L. R. B. No. 23. A copy is contained in the record herewith at pages 157 to 188, inclusive. The opinion of the Circuit Court of Appeals is reported in 130 Fed. (2d) 624 and is contained in the record herewith at pages 2069 to 2082 inclusive. The opinion includes another case, No. 9784 on the docket of said Court, which was consolidated with this for hearing. Petitioner is filing concurrently its petition for a writ of certiorari in the other case, No. 9784.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended, 28 U. S. C. A. 347 (a), and Section 10 (e) of the National Labor Relations Act. Petitioner also relies on Rule 38, Paragraph 5 (b) of this Court for its grounds upon which this petition is made.

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[1]References are to pages of the case record No. 9785 in the Circuit Court.

STATEMENT OF THE CASE.

This case involves the discharge by petitioner, in September, 1937, of Paul Kovacich, Arthur Slattery, William Slattery, Thomas Rae Cochrane, Attilio Barbano, Edward McCarthy, John Marconi, William Nicholas, Mario Petrocchi, and Frank Ruggiero, hereinafter referred to as the Messengers. They were employed by petitioner as automotive messengers in the San Francisco area and their discharge was in connection with a change from the direct employment of messengers to a contract system (28-32).

On April 19, 1938, United Office & Professional Workers of America, Local No. 34 (C. I. O.), filed a charge with the Regional Director of the Board at San Francisco alleging unfair labor practices under Section 8, Subsections (1) and (3) of the Act in discharging the ten messengers and another employee. (Board's Exhibit 1-A, R. 1-3.) On August 10, 1938, the same union filed with the Regional Director of the Board an amended charge. (Board's Exhibit 1-B, R. 3-5.) The amended charge included the ten messengers and three other employees. On October 16, 1939, the same union filed a second amended charge including the ten messengers and the same three other employees. (Board's Exhibit 1-C, R. 6-8.) In the subsequent proceedings the charges in behalf of the three other employees were dropped and the case in the Court below involved only the ten messengers.

The Board issued its complaint on November 22, 1939, more than two years after the discharge of the messengers. (Board's Exhibit 1-D, R. 9-16.) On De-

cember 14, 1939, petitioner filed its special appearance and a motion to dismiss the proceeding on jurisdictional grounds. (Board's Exhibit 1-G, R. 44-51.) Reserving its defense that the Board was without jurisdiction, it answered the complaint on its merits. (Board's Exhibit 1-H, R. 18-42.)

The hearing before the Trial Examiner was concluded on January 9, 1940 (1978), and his intermediate report was made on March 23, 1940 (1976-2022). Petitioner filed with the Board its exceptions to the intermediate report on May 6, 1940 (163), objecting to the jurisdiction of the Board and to the findings and to rulings of the Trial Examiner (51-156).

The case was argued before the Board on June 4, 1940 (163). Its decision and order were filed on August 6, 1940. In its decision and order the Board found that petitioner was an employer within the meaning of Section 2 (2) of the Act, that it was engaged in commerce within the meaning of Section 2 (6) of the Act, that its operations affect commerce within the meaning of Section 2 (7) of the Act, and that it had engaged in unfair labor practices inhibited by Section 8 (1) and (3) of the Act (157-188).

Petitioner filed with the Board its exceptions to the decision and order and a motion to vacate the order and to reopen the case for further hearing (190-265). The Board denied the motion and petition, without hearing or notice, on October 22, 1940 (2022).

On April 1, 1941, the Board filed in the Court below its petition for an order of enforcement (266-273).

Petitioner filed its answer to the petition on June 12, 1941 (274-356).

Upon its first appearance petitioner filed its objections to the jurisdiction of the Board and denied that it was subject to the Act (44-50). Thereafter petitioner renewed and repeated its objections to the jurisdiction of the Board and moved that the case be dismissed for lack of such jurisdiction upon the following occasions:

When the hearing opened before the Trial Examiner (365-370); when the Board's evidence was in and before putting on any affirmative factual defense (1296-1305); at the close of the hearing by the Trial Examiner (1949-1950); in its exceptions to the intermediate report (51-58); upon the hearing of the case before the Board (70-78); and in its exceptions to the decision and order of the Board (190-265).

For the purposes hereof petitioner relies on the following defenses specifically pleaded and stated in its answer to the petition for enforcement in the Court below:

General Defenses.

1. The jurisdictional defense that the activities of petitioner as a national bank are not in commerce and do not affect commerce within the meaning and intent of Section 2(6) and 2(7) of the Act or Article I, Section 8(3) of the Constitution. (Answer—pp. 295-300, 311-313, 307, 317.)

2. The jurisdictional defense that petitioner as an agency and instrumentality of the United States is an excepted employer under Section 2(2) of the Act. (Id.)

3. The defense on the merits that the findings and conclusions of the Board are not supported by substantial evidence. (Answer—pp. 300-307, 308.)

4. The defense on the merits that the findings and conclusions of the Board rely for substantial support on expressions of opinion on the subject of unionization of bank employees which were not connected with the alleged unfair labor practices and without which support the findings and conclusions are supported by mere surmise and suspicion. (Specifications in answer —Nos. 9, 11, 12, 13, 14, 18, 19, 26 and 27 on pp. 302-304.)

5. The defense that the trial examiner denied to petitioner due process of law in refusing a subpoena to compel the attendance of witnesses and to produce evidence which petitioner deemed material to its defenses on factual issues and in refusing an offer of proof to the same end. (Answer—VI at page 315 and VII at page 316.)

Special Defense.

1. A special defense alleged on discovery of facts contained in a transcript of the proceedings and report of a Committee of the House of Representatives appointed by the Speaker of the House on July 20, 1939, under House Resolution No. 258 adopted on July 13, 1939, that the proceedings and conduct of the Board

in the other case No. 9784 in the Court below were so partial, unfair and predetermined and of continuing effect as to affect and motivate the proceedings of the Board and its decision in this case. (Answer—IV pp. 320-342, V pp. 342-354, VI p. 354.)

On December 30, 1941, petitioner filed in the Court below its petition and motion for the appointment of a special master to take evidence on the issue made by the special defense in its answer to the petition of the Board whether the proceedings of the Board were conducted in accordance with due process of law (2027-2058). The petition and motion were heard, argued and submitted on February 9, 1942 (2058-2059). In support of its motion at the time of the hearing petitioner filed with the Court below by its consent a transcript of the proceedings and report of the House Committee which contained evidence in support of said motion on the issue of due process (2059). On March 4, 1942, the Court below entered, without opinion, its order denying said petition and motion in the following terms:

"ORDER DENYING MOTION OF RESPONDENT, ETC.

"Upon consideration thereof, and by direction of the Court, It Is Ordered that the motion of respondent for appointment of a Special Master to take evidence on the issues raised by the affirmative defenses of respondent's answer and for other relief be, and hereby is denied.

"It Is Further Ordered that respondent file its brief on the merits in reply to petitioner's brief

within 30 days from date. (Wilbur, C.J. does not take part in this order because of illness.)" (2059).

On May 26, 1942, petitioner filed in the Court below its motion for trial of the issue of due process made by its answer to the petition for enforcement and gave notice thereof to the Board (2060-2062). The motion was heard and the case was argued on its merits and submitted in the Court below on June 5, 1942 (2068). In its opinion and decree made and filed on September 14, 1942, the Court below made no further reference to said motion and has made no ruling or order thereon[2] (2069-2085).

QUESTIONS PRESENTED.

The case arises under the National Labor Relations Act, hereinafter referred to as the Act, Title 29, U. S. C. A. Chapter 7, Sections 151 to 166. Petitioner also invokes and will rely upon the National Bank Act and upon Article I, Section 8 (3), Article I, Section 8 (18), and the First and Fifth Amendments of the Constitution.

Under Section 2 (6) and Section 2 (7) of the Act and Article I, Section 8 (3) of the Constitution, a question of jurisdiction has arisen in the case whether

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[2]The order of March 4, 1942, denying the motion for appointment of a special master also appears in the record at page 2067 but is an inadvertent duplication in printing of the order which appears at page 2059.[2]

the activities of petitioner as a national bank are in commerce or affect commerce.

Under Section 2 (2) of the Act and under Article I, Section 8 (18) of the Constitution a question of jurisdiction has arisen in the case whether petitioner is excluded as an employer subject to the Act by the exclusion of the United States as an employer.

Under the Fifth Amendment of the Constitution two questions have arisen in the case whether the proceedings of the Board and of the Court below were in accordance with or constituted due process of law.

The first question of due process is whether an instruction of the Chief Trial Examiner of the Board to its Trial Examiner in the companion case No. 9784 to accept doubtful evidence and to err in favor of the Board on jurisdictional issues was prejudicial to petitioner in both cases because it evidenced a continuing policy and predetermination of the Board to find that it had jurisdiction, and such predetermination would in the nature of things influence any Trial Examiner to decide facts adversely to petitioner in any other contemporaneous controversy on like issues.

The second question of due process which appears in this case and not in case No. 9784 in the Court below, is whether it was due process of law for the Trial Examiner to deny to petitioner a subpoena to obtain evidence which it deemed material to its defense. Involved in the same question is a question whether a rule of the Board which requires a respondent employer to make application for subpoenas and

to show cause therefor is fair and in due process of law while the same rule permits subpoenas to be issued on request of the Board without imposing the same burden of showing the reason therefor.

Under the First Amendment of the Constitution a question has arisen in the case whether petitioner, if it is an employer subject to the Act, is to suffer penalty thereunder for expressing opinions on the subject of unionization of bank employees, if such expressions were not used coercively or to intimidate its employees.

Under Section 10 (e) of the Act a question of fact and law has arisen in the case whether the findings of the Board depending for support in a large measure on expressions of opinion are supported by substantial evidence.

REASONS FOR ALLOWANCE OF THE WRIT.

1. In holding that the activities of petitioner as a national bank are in commerce or constitute commerce within the intent of Section 2 (6) of the Act, and that its activities affect commerce within the intent of Section 2 (7) of the Act, the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. The question involves not only the relation to commerce of the general activities of banking but also the intent of the National Bank Act (U. S. R. S. 5136, 12 U. S. C. A. Sec. 24) and the intent of the National Labor Relations Act as dis-

closed by House of Representatives Report No. 1147 of the 74th Congress (1935).

2. In holding that particular banking activities of petitioner are in commerce or constitute commerce the Circuit Court of Appeals has decided important questions of federal law probably in conflict with applicable decisions of this Court.

Hemphill v. Orloff (1928), 277 U. S. 537;
Engel v. O'Malley (1911), 219 U. S. 128;
Ware & Leland v. Mobile County (1908), 209 U. S. 405;
Hopkins v. U. S. (1898), 171 U. S. 578;
Nathan v. Louisiana (1850), 8 How. 73;
U. S. Fidelity and Guaranty Co. v. Kentucky (1913), 231 U. S. 395.

See also other transactions which are held to be only incidental to commerce:

New York Life Ins. Co. v. Deer Lodge County (1913), 231 U. S. 495;
New York Life Ins. Co. v. Cravens (1900), 178 U. S. 389;
Paul v. Virginia (1869), 8 Wall. 168.

3. In holding that the activities of petitioner as a national bank may be regulated under the commerce powers, the Circuit Court of Appeals has decided an important question of federal law in a way which is probably in conflict with applicable decisions of this Court which hold that the power to create and regulate national banks is contained in Article I, Section 8 (18) of the Constitution.

M'Culloch v. Maryland (1819), 4 Wheat. 316;

Osborn v. Bank (1824), 9 Wheat. 738;
Farmers' and Mechanics' Nat'l Bank v. Dearing (1875), 91 U. S. 29.

4. In holding that activities of the kind in which petitioner is engaged may be regulated under the commerce powers, the Circuit Court of Appeals has decided an important question of federal law in a way which is probably in conflict with decisions of this Court which hold that the several states may create and regulate banks under their police powers.

Noble State Bank v. Haskell (1911), 219 U. S. 104;
Shallenberger v. First State Bank (1911), 219 U. S. 114.

5. In holding that petitioner is an employer within the intent of Section 2 (2) of the Act, which excludes the United States as an employer, and by necessary implication excludes its instrumentalities, the Circuit Court of Appeals has decided an important question of Federal law in a way which is probably in conflict with applicable decisions of this Court.

Fed. Land Bank v. Bismarck Lumber Co. (1941), 314 U. S. 95;
First Nat'l Bank of San Jose v. California (1922), 262 U. S. 366;
Easton v. Iowa (1903), 188 U. S. 220;
Osborn v. Bank (1824), 9 Wheat. 738;
M'Culloch v. Maryland (1819), 4 Wheat. 316;
Constitution, Art. I, Sec. 8 (18).

6. In denying petitioner's motion for the appointment of a Special Master or other appropriate means

to take evidence in support of its defense that the proceedings of the Board and its Trial Examiner were not in due process of law, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Morgan v. United States (1937), 304 U. S. 1;
Morgan v. United States (1935), 298 U. S. 468.

7. In failing to pass upon petitioner's motion for leave to introduce evidence in support of its defense that the proceedings of the Board and its Trial Examiner were not in due process of law, the Circuit Court of Appeals denied to petitioner due process of law and has so departed from the usual and accepted course of jurisdictional proceedings as to call for the exercise by this Court of its power of supervision.

Ford Motor Co. v. N. L. R. B. (1938), 305 U. S. 364;
Consolidated Edison Co. v. N. L. R. B. (1938), 305 U. S. 197;
Cohens v. Virginia (1821), 6 Wheat. 264.

8. In affirming the order of the Trial Examiner refusing petitioner's request for a subpoena to compel the attendance of witness and to produce evidence which it deemed material to its defenses, the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

Inland Steel Co. v. N. L. R. B. (1940), 109 Fed. (2d) 9.

9. In holding that the findings of the Board, which rest for their substantial support on expressions of

opinion, are supported by evidence, the Circuit Court of Appeals has decided an important federal question in a way which is probably in conflict with another applicable decision of this Court.

N. L. R. B. v. Virginia E. & P. Co. (1941), 314 U. S. 469.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court in the case numbered 9785 on its docket and entitled "National Labor Relations Board, Petitioner, v. Bank of America National Trust & Savings Association, Respondent", to the end that said cause may be reviewed and determined by this Court as provided by the statutes of the United States, and for such other and further relief as may be proper.

Dated, San Francisco, California,
February 17, 1943.

HERBERT W. ERSKINE,
EDMUND NELSON,
G. D. SCHILLING,
LOUIS FERRARI,
Counsel for Petitioner.

KENNETH M. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the petitioner's counsel in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
February 17, 1943.

HERBERT W. ERSKINE,
Counsel for Petitioner.